IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 4TH DECEMBER 2006 / 13TH AGRAHAYANA 1928

ST.Rev..No. 308 of 2004()

TA.18/2004 of S.T.A.TRIBUNAL,ADDL.BENCH,KZD.
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PETITIONER/APPELLANT/ASSESSEE:

SREEDHARAN PALAKKAL,
CONTRACTOR, `SHEMI'S SHELTER',
NELUNNI, MATTANNUR.

BY ADV. SRI.T.M.SREEDHARAN
SRI.DEEPAK JOY.K.

RESPONDENT: RESPONDENT/REVENUE:

STATE OF KERALA,
REPRESENTED BY CHIEF SECRETARY TO GOVERNMENT,
SECRETARIAT, THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI.GEORGEKUTTY MATHEW

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 04/12/2006, ALONG WITH STRV NO. 309 OF 2004, STRV NO. 310 OF 2004, STRV NO. 311 OF 2004, STRV NO. 312 OF 2004 AND STRV NO. 313 OF 2004 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMAN & K.P.BALACHANDRAN,JJ.

S.T.Rev.Nos 308/2004, 309/2004, 310/2004, 311/2004, 312/2004 and 313 of 2004

Dated this the 4th day of December, 2006

J U D G M E N T

Raman, J

These revisions arise out of common order of the Tribunal in STA Nos.813 to 818 of 2003. The assessment year relates to 1995-96 to 2000-2001. The facts are extracted from STR 308/2004. The appellant is an assessee under the Kerala General Sales Tax Act (KGST). He was a contractor under the Kerala Water Authority. According to him the works undertaken by him are civil works. He referred to serial Nos. 17 to 19 and 22 of the IVth schedule of KGST Act, 1963 and contended that the works undertaken by him will fall under the above items of work. Kerala Water Authority, the awarder is a registered dealer under the KGST Act. The materials for the work except boulders, jelly, laterite stone and sand were supplied by the Kerala Water Authority and as directed by Government, 2% from among the amount payable was deducted by the Awarder. The assessments were completed on the basis of the statements from the Awarder.

The assessee claim the benefit of compounding under Section 7 (7) of the KGST Act. The Assessing Officer held that as per application submitted by the assessee in Form 21B he has sought permission to pay tax under section 7 (7A) of the Act. It was found to be in order and accordingly assessed him to pay tax at 5%. On further appeal, the first appellate authority namely, the Appellate Assistant Commissioner after verification of the true copies of the schedule of work undertaken by the assessee for all the above six years, the following were found to be in the nature of different works undertaken by him.

1. Construction of retain wall for protection of sub section at veliayambra.
2. Laying gravity main.
3. Construction of well cum pump house.
4. Providing barbed wire fencing on top of compound wall.
5. Protection of work near pipe line bridge.
6. Providing guard stone and vehicle protection gate.
7. Construction of pre-cast valve chamber.
8. Construction of Foot bridge to open well.
9. Dismantling and relaying existing 90 mm pvc pipe.

10. Construction of steel taps, valve chamber and fixing valves.

11. Laying 50 mm PVC pipe.

12. Laying distribution system.

13. Laying of 350 mm CI Pipe for pumping main.

14. Construction of GL tank

15. Construction of OH tank.

2. Though the assessee has also executed several other contracts during the year, it is also the same nature, some of which may come under the nature of civil works. But according to the first appellate authority the works undertaken by the assesee will not come under civil work as specified in sub section 7 of Section 7 and accordingly confirmed the order of the Assessing Officer and dismissed the appeal. On further appeal to the Tribunal, it also agreed with the view expressed by the lower authority and dismissed the appeal. It is against the said order passed by the appellate tribunal that the present appeals are filed.

3. The point that arises for consideration is only as to whether the appellant is entitled to pay tax at the rate of 2% instead of 5% and whether the works undertaken by him is in the

nature of civil work as specified under Section 7 (7A) of the KGST Act.

4. Though reliance was placed on the decision of this court in **S.Philipose Vs. The State of Kerala (2002)10 KTR 150 (ker)**, the facts in those cases was dissimilar to the facts in issue as rightly found by the appellate authority. The learned counsel Sri.Sreedharan appearing on behalf of the appellant contended that some of the works undertaken by him are civil works, but the authorities assessed him at a higher rate even in respect of these works, which is illegal and against the provisions of Section 7 (7A) of the Act. In this connection he also placed reliance on the explanation added to Section 7 with effect from 01/01/04. The Tribunal by the impugned order in appeal entered the following findings.

“In the application filed by the assessee in form 21B requesting for permission to pay tax at compounded rate as provided under sec.7 (7A) of the Act, 1963, the assessing officer found that the applications were in order. A perusal of the order passed by the first appellate authority who verified the copies of the schedule of work undertaken by the appellant for all these

years had given a narration of the 15 items and found that the nature of various other works executed by him during the period few of them appears to be contract works under the nature of civil works. But in the case of the assesee in the assessment filed relating to the year 95-96, containing form 9 of the annual return filed by him it is revealed that the contract involved is not in the form of goods and the rate of tax applicable is noted in column 3 as 5%. Similar in Form 9 Annual returns also are seen filed by the assessee for the remaining five years of assessments. The assessee himself has stated that the tax payable and due for the respective contract amounts is 5%." The Tribunal further found as a matter of fact that for all these six years of assessment, the assessee filed Form 21B contained in page 9 of the assessment file for the years in question revealed that the assessee has conceded to pay tax at the rate specified in sub sec 7(A) of sec.7 and not under sub section (7) of Sec.7 under which the rate of tax payable is only 2%.

5. The various works undertaken by the petitioner as found by the authorities was stated to be not civil work of the nature specified in Section 7. Even in the appeal memorandum

filed by the appellant, the Tribunal observed that the appellant has conceded that he has undertaken works of nature contained in Serial Nos.17 to 19 and 22 of the IVth schedule of the KGST Act and he also contended that at the same time he is liable to pay tax at the rate of 2% only under section 7(7) and not under section 7 (7A) of the KGST Act.

6. On an overall consideration of the above aspects and having due regard to the nature of the works undertaken by the appellant, it was found that the works undertaken by him could not come under Section 7(7) of the KGST Act. Accordingly appeals were dismissed.

7. In this connection we may refer to provisions of Section 7(7A) which reads as follows:

> Notwithstanding anything contained in sub-section (1) of section 5 every contractor not covered by sub-section (7) may at his option, instead of paying tax in accordance with the said section, pay tax on the whole amount of contract at the rate of seventy percent of the rates shown the said section, pay tax on the whole amount of contract at the rate of seventy percent of the rates shown in the Fourth Schedule against such contract, less any tax paid by him under this Act on the purchase of any goods used in such contract, the transfer of which to the work contract was effected without any processing or manufacture:
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> Sub-section (7) with Explanation was substituted w.e.f.

01.04.2004. Prior to substitution, it was as follows:

"(7) Notwithstanding anything, contained in sub-section (1) of section 5 every contractor, in civil works of construction of buildings, bridges, roads (railway tracks, walls including sea walls) (dams and canals including any repair or maintenance of such civil work) may at his option instead of paying tax in accordance with clause (iv) of that sub-section pay tax at the rate of (two percent) on the whole amount of contract and which shall be deducted from the payments made by the awarder at every time including advance payment and shall remit it to Government in such manner as may be prescribed.

Subsequently, with effect from 01/04/2000 the section was amended and an explanation was also added. This amendment was brought out by way of substitution w.e.f. 01/04/2004 which reads as follows:

(7): Notwithstanding anything contained in sub-section (1) of section 5, every contractor in civil works may, at his option, instead of paying tax in accordance with clause (iv) of that sub-section, pay tax at the rate of two per cent on the whole amount of contract.

Explanation: For the purpose of this section, "Civil works" means construction or repair or maintenance of buildings, bridges, roads, runways, dams, canals, wells, ponds, swimming pools, water tanks or culvert including any masonry work or any other work of the like nature as may be notified by government in this behalf, from time to time but shall not include any improvement or upgradation of such civil work by means of fixing or laying of all kinds of floor tiles, mosaic tiles, slabs, stones, marbles, glazed tiles, painting, polishing, partitioning, wall penalling, interior decoration, false sealing, carpeting, electrification, air-conditioning or any other improvement on an existing structure.

8. From the above, it can be seen that not only the above was amended with an explanation, but even the main Section 7 (7) underwent some changes. This section was not given retrospective effect expressly or impliedly.

9. The first submission of the learned counsel appearing on behalf of the appellant is that the explanation being only of a clarificatory nature must be given some meaning to the provision as it stood even prior to its amendment. We are unable to agree with this contention. The explanation as added is not merely clarificatory in nature. Further Section 7(7) itself underwent some changes. If the legislature wanted to give any retrospective effect to the provision as amended, it should have given effect of such retrospectivity by express provision embodied in that behalf. That was not done. There is nothing to indicate in the provision that even impliedly the intention was to give any retrospective effect. In this connection, the similar contention raised was considered by this court in **George Peter v. State of Kerala (STR 458 of 2004).** It was held that concession made by the Finance Act cannot in any way be treated as clarificatory one. The legislature has specifically provided that every civil work for

construction of buildings, bridges, roads etc and railway tracks were added to the said provision. Since the words “railway tracks”were specifically included from 01/04/1999, benefit under the amendment Act cannot be with retrospective effect. In **Ramdil Construction Co. v. State of Kerala (STR 416 and 417/2005)** the question came up for consideration before this court as to whether anti sea erosion works and maintenance of anti sea erosion work come under the expression civil works relating to construction of buildings. There also the period was prior to the amendment brought out by Finance Act, 1999 w.e.f. 01/04/1999. This court held that before the amendment was brought out w.e.f. 01/04/1999, even if the work is of civil nature, unless and until that work is specifically brought in Section 7 (7) of the KGST Act, the assessee will not be entitled to get the benefit. In **Abdul Majeed v. State of Kerala (2006(3) KLT 548)**, the question arose for consideration as to whether construction of drain or culvert form part of “civil work”. It was held that items mentioned in Section 7(7) are specific such as building, bridges, roads, railway tracks, walls including repair or maintenance of such civil works which do not take in drains or

culverts. This court is not justified in adding items which the legislature in its wisdom has not included. The contention that construction of culvert and drain is only civil work and therefore he is entitled to benefit of payment of tax at lesser rate of 2% was repelled by the court on the above said reason.

10. The learned counsel for the appellant however contended that atleast in respect of foot over bridge and pump house and well/pump house it should be treated as civil work of construction of building and bridges. The 15 items of work undertaken by the appellant were referred to by the First appellate authority and held that none of those items comes under the specified items under Section 7(7) of the Act. No specific contention as such whether foot over bridge and pump house should get a different treatment falling under civil work in the nature of construction of the building does not appear to have been raised before the Tribunal. At any rate, in the absence of any materials placed on record regarding the nature of such pump house constructed, it cannot be said that by the description by itself will enable the petitioner to claim that the said civil works are in the nature of construction of buildings. Foot over bridge at

any rate cannot be said to be a civil work of construction of a building. Similarly, the construction of well also cannot be said to be a civil work of construction of building, but however in the case of construction of pump house what is the actual construction carried out by the appellant and whether it will fall as a civil work of construction of the building may be reverified by the Assessing Officer on the materials available on record and have a second look on the same.

Except to the above extent, we find no merit in these appeals and are accordingly dismissed.

P.R.RAMAN, JUDGE

K.P.BALACHANDRAN, JUDGE

Rp